SUPREME COURT, U. S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1228

WILTON ROSS THOMPSON;
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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WILTON ROSS THOMPSON,
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PETITION FOR WRIT OF CERTIORARI
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Wilton Ross Thompson, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on January 2, 1968.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit printed in Appendix "A" hereto, infra, pp. i-iii, is reported in —F.2d—(December 12, 1967).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment in this case on December 12, 1967. (A copy thereof is printed in Appendix "B".) A timely petition for reheating was filed on February 1, 1968 and denied by said Court on February 12, 1968. On application of petitioner, that Court stayed an issuance of its mandate under Rule 26 of that Court pending the filing, consideration and disposition of this petition by this Court providing this petition is filed on or before March 13, 1968.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. Sections 1254(1) and 1651(a).

QUESTIONS PRESENTED

1. Whether the following substantive federal rule of evidence as decided by the United States Supreme Court, the Second Circuit, the Third Circuit, the Fifth Circuit and the Eighth Circuit (which rule is singularly not followed by the Ninth Circuit) is a question of due process of law under the Fifth Amendment to the United States Constitution so that the holding herein by the Ninth Circuit results in a trial without due process of law?

> *Rule:* Proof of the unexplained possession of unusual amounts of money after a theft, standing alone is *not competent* evidence to connect the possession with the theft and is therefor inadmissible.

2. When alleged facts relied upon by an appellate court in its decision affirming a conviction are obtained from the Govern-

ment's Brief and not substantiated by the record, does such result in an affirmation of conviction without due process of law in violation of the Fifth Amendment to the United States Constitution?

3. Whether deliberate misrepresentations by Government counsel and gross misconduct throughout the trial deprived petitioner of a fair and impartial trial without due process of law in violation of the Fifth Amendment to the United States Constitution?

4. Whether upon a thorough consideration of the misconduct of the Government attorney, erroneous rulings on the admissibility of evidence by the trial court and the failure of the trial court to give proper instructions on impeachment, petitioner was deprived of a fair and impartial trial and therefore his liberty without due process of law in violation of the Fifth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C. Section 2113(a):

> " * * * Whoever enters or attempts to enter any bank, or any savings and loan association, or any build-

ing used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building,or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

STATEMENT OF THE CASE

1. Proceedings Below:

On January 27, 1965, Nathan Nylan Robeson and petitioner were charged by indictment with entering a Savings and Loan Association on August 1, 1964 with intent to commit a felony in violation of Title 18 U.S.C. 2113(a). To this charge Robeson pleaded guilty and petitioner pleaded not guilty. Jury trial was commenced in April, 1965 before the Honorable Oliver J. Carter. This trial concluded with the jury being unable to agree. Thereafter, an information was filed, charging Thompson with essentially the same offense as in the original indictment.

This appeal arises out of the jury trial on the information, which trial began on September 6, 1966 before the Honorable Albert Wollenberg.

On September 7, 1966 petitioner filed a trial memorandum directing the Court's attention to the testimony of Sterling Blair, concerning the purchase of an automobile by petitioner on September 14, 1964. This was a second trial of this cause and petitioner was seeking to acquaint the Court with this purported evidence so as to avoid highly prejudicial testimony concerning the purchase of an automobile for cash from going before the jury. A statement of the law applicable was contained in the memorandum in question. Petitioner on September 8, 1966 filed a second

trial memorandum in support of a request that the jury view the premises in question. Petitioner filed a third trial memorandum on September 9, 1966 in support of a motion for mistrial and directed judgment of not guilty. A motion for judgment of acquittal was made on the same day and denied.

On September 14, 1966 the jury returned a verdict of guilty of the offense charged in the information.

On October 14, 1966 judgment was made and entered, sentencing the petitioner to commitment for a period of eight years. On that same date, petitioner filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the judgment.

Jurisdiction of the District Court rested on Title 18 U.S.C. Section 2113(a) and Title 18 U.S.C. Section 2.

Jurisdiction of the United States Court of Appeals for the Ninth Circuit rested on Title 18 U.S.C. Sections 1291 and 1294.

2. Statement of the Facts:

The major Government witness was Nathan Nyland Robeson, a convict who admitted the burglary of the First Savings and Loan Association (R.T. 232). He stated that the first time that he talked to petitioner was in June of 1964 (R.T. 233). He said that on several occasions petitioner mentioned a burglary to him. The discussions allegedly took place at the Diamond Heights redevelopment project (R.T. 233).

Robeson claimed he had a conversation with petitioner regarding the proposed burglary in question on Stockton and Ellis streets at approximately 4:00 or 5:00 p.m. the week before the burglary (R.T. 235). He claimed he drove from the Diamond Heights project, where he worked, in the car of petitioner, with petitioner. He claimed he was working that date at the project, but construction superintendent, Olie Everson, testified from the records that Robeson had not worked on the job after July 10, 1964 (R.T. 281). Robeson stated that on July 31, 1964, petitioner gave him

the key to the First Savings and Loan Association. In this regard, he was completely impeached.

He testified he went to the Loan Company by his own transportation (R.T. 240). Robeson went into the First Savings and Loan Association at approximately midnight July 31, 1964 dressed in sports clothes and had work clothes underneath (R.T. 241). He iidentified the hole he knocked in the wall in pictures shown him (R.T. 242). After knocking the hole in the wall, he broke into some vending machines (R.T. 243) and also a vending machine in the women's lavatory. He was in the room where the empty cash boxes were discovered (R.T. 244). He was then questioned about the money cans (R.T. 245). He claimed that they were opened by him and petitioner.

He testified that petitioner arrived at the First Savings and Loan Association for the burglary at approximately 7:00 a.m., August 1, 1964 (R.T. 250, 18-22). He was asked by the Court on page 251 of the reporter's transcript the same question and again he stated that petitioner came to the First Savings and Loan Association at approximately 7:00 a.m. He testified that he left there with petitioner at 7:30 a.m. on the day in question (R.T. 251, 15-21). Robeson testified that he was arrested on December 11, 1964 and, at that time, was shown Government's Exhibits 16-A and 16-B, which were pictures of the petitioner that he identified (R.T. 254). (On its face 16-B was taken the day following the arrest, December 12, 1964.)

Robeson's cross examination is startling and informative. Never has a witness been so totally impeached in the memory of petitioner's counsel. He stated that the first time that he heard of planning the burglary of the First Savings and Loan Association was about a week before he committed the burglary in question (R.T. 263). He testified that he had talked with the petitioner on the phone regarding this (R.T. 266). It was directed to his attention that in the first trial of the cause he had claimed that this conversation had taken place at the place of employment; and, when he was shown that such was impossible (in that he no longer

worked there) he tailored his testimony to meet the needs of the prosecution.

He testified in the present trial that he had done work for petitioner. He was impeached in this regard on pages 291 and 292 of the reporter's transcript by his testimony at the previous trial. He testified that he had changed his testimony after discussing the case with the prosecuting attorney in regard as to where he had met the petitioner in connection with the burglary (R.T. 294).

Robeson was repeatedly impeached by important differences between his testimony at the previous trial and the present case. There were important variations in his narration of his contact with petitioner (R.T. 295-308, inclusive; 430-431; 437).

Michael Heim, an acquaintance of Robeson, testified that he has known petitioner since 1964, when they worked together on the Diamond Heights construction job (R.T. 143). The Diamond Heights construction job was also known as the Red Rock Hill construction job, located in the Twin Peaks area of San Francisco (R.T. 144, 4-8). He testified that sometime after he had met petitioner, they had several conversations relating to a burglary (R.T. 145, 1-4). The first conversation allegedly took place where they worked at Diamond Heights (R.T. 145) sometime in June, 1964. He could not remember the details (R.T. 146). He stated that he was acquainted with Robeson (R.T. 150), and testified that during the period of time under discussion in 1964 Robeson was living in his house. Heim stated that during this time, he had no discussions with Robeson about any plans to do a burglary (R.T. 150). He stated that he first heard of the burglary herein after August 3, 1964 by reading about it in the newspaper. Sometime in October, 1964, he read of a misprision case and called the Federal Bureau of Investigation (R.T. 152) and discussed the burglary matter with Agent Thomas Padden.

He admitted on cross examination (R.T. 159) that he was convicted of pandering in Nevada by a plea of guilty and sentenced from two to ten years on that charge. The charge was that he will-

fully and unlawfully pursuaded and encouraged his wife, Barbara Mae Heim, to become a prostitute and live in a house of prostitution (R.T. 160-16). Heim stated that he sold sweaters with Robeson to his co-workers at Red Rock Hill, telling the purchasers that they were stolen (R.T. 162). He admitted that he had lined up a burglary at the Travel Lodge Motel (R.T. 195). He admitted he was on probation from the Nevada conviction heretofor referred to and that his probation could be revoked (R.T. 197-198). He testified that he went to the Federal Bureau of Investigation because of Nathan Robeson's activities (R.T. 198). He further testified (R.T. 200) that burglaries of downtown business stores by Robeson worried him in that he might become implicated.

Though the burglary took place on August 1, 1964, the Federal Bureau of Investigation did not receive any leads until Agent Padden had an interview with Mike Heim on October 25, 1964 in a bar on 18th Street in San Francisco (R.T. 92).

The petitioner proved by the testimony of five independent witnesses that it was impossible for him to be present in the First Savings and Loan Association on the morning of August 1, 1964. This evidence was confirmed by Sheila Coats, his present wife, who was living with him at the time. Petitioner worked on a job for his employer at the Hibernia Bank in San Francisco on August 1, 1964. David Ahern, a guard at the Hibernia Bank on that date, maintained the entry and signout book at the only access door to the bank (R.T. 572-573). He checked his clock as to the time that petitioner checked in and the clock said 8:00 a.m. Petitioner signed the book in his presence, together with Richard Burrows, James B. Getty and Vernon Schwarz (R.T. 574 -575). Burrows and petitioner left the Hibernia Bank sometime after 1:00 p.m. (R.T. 575).

Getty and Schwarz both worked for the Pacific Telephone and Telegraph Company and had not met petitioner before. They both testified that they arrived at 8:00 a.m. and worked there all day, often with petitioner (R.T. 581, 586). They logged in at the same time as petitioner — 8:00 a.m. They saw petitioner during the

day on several occasions (R.T. 589).

Richard Burrows was a co-worker with petitioner for the Scott Electric Company (R.T. 593). His best judgment was that he arrived at the Hibernia Bank on August 1, 1964 before petitioner and that he helped petitioner unload his tools and that they had coffee prior to logging in at the bank. When they returned after coffee to log in at the Hibernia Bank, two Pacific Telephone men were there, as well as the guard (R.T. 595-596).

Sheila Thompson, nee Coats, testified on behalf of her husband (R.T. 620). In 1964, she was employed with the First Savings and Loan Association. Petitioner is her present husband but he was not her husband during the first months of 1964, although she was living with him during that period of time (R.T. 621). She testified that on July 31, 1964, a man named David Calhoun, who was also an electrician, came to their apartment (R.T. 629). Petitioner and Sheila had an apartment together, for which they paid $140.00 per month for rent (R.T. 626). Calhoun arrived at 7:15 p.m. or 7:30 p.m. and Sheila, petitioner and Calhoun amused themselves during the evening playing cards or listening to television until approximately 2:00 a.m. They were drinking (R.T. 631). Calhoun was separated from his wife, and he stayed at their apartment overnight (R.T. 631). She awoke on the morning of August 1, 1964, between 6:30 and 6:45 a.m. She was awakened by an alarm clock (R.T. 632). Calhoun and petitioner slept in the bedroom and she slept on the couch. She furnished Calhoun with coffee and tomato juice about 10 or 15 minutes after 7:00 a.m. The petitioner left to go to his job at approximately 7:30 a.m. (R.T. 633).

David Calhoun testified that he went to petitioner's apartment at 7:30 p.m. on Friday, July 31, 1964 (R.T. 693-696). Sheila Coats was there (R.T. 697). Calhoun remained at the apartment all night as a guest and left at approximately 7:45 a.m. on August 1, 1964. Mr. Calhoun confirmed the testimony of Sheila Coats that she slept on the couch in the front room and he slept in the bedroom with petitioner (R.T. 698). Petitioner left for work

at 7:30 a.m. Calhoun testified, and he remembered this because he heard the radio announcer say "And now for the 7:30 news."

F.B.I. Agent Thomas Padden testified that he made an automobile test of driving from 590 - 26th Avenue, San Francisco, to the Hibernia Bank, Sutter and Grant, San Francisco, and then to the First Savings and Loan Association. The total driving time amounted to 18 minutes (R.T. 88-89). 590 - 26th Avenue, San Francisco, was the residence of petitioner and Sheila Coats in 1964.

One of the witnesses called by the Government was Edward Scott (R.T. 48:19). Mr. Scott is the president of the Scott Electrical Company, by whom petitioner was employed during the year 1964 *and* at the time of trial. He testified that he had never loaned petitioner any money (R.T. 50, 17-18).

After Mr. Scott testified, the Government called Sterling Blair. Prior to the opening statement of the Government, petitioner's counsel objected to the admissibility of Blair's testimony in his first trial memorandum. Petitioner's counsel strenuously objected to the testimony to be given by Blair concerning the purchase of an antomobile by petitioner from Blair on September 13, 1964, 44 days after the burglary (R.T. 13-320).

Blair, over defense counsel's strenous objections, took the stand and testified that petitioner purchased from him an automobile he had advertised for sale (R.T. 319-320). Blair testified that he sold the car to petitioner for the sum of $3,000.00, with the denominations of the bills being $20.00 or less and that there were four denominations altogether (R.T. 325). Over defense counsel's strenous objections, he was permitted to testify as to a conversation allegedly had with petitioner at the time the automobile was paid for. He testified that petitioner told him that he had been held up in court during the day and he had found it necessary to go to his company's office to get the cash to buy the car (R.T. 337).

The defense proved that petitioner during the early part of 1964 was undergoing marital difficulties with his then-wife and divorce proceedings were in progress. On February 12, 1964, he closed an account at the First Savings and Loan Association and

received cash in the amount of $2,187.00 (R.T. 557). Sheila Coats had withdrawn $250.00 in cash August 7, 1964 (R.T. 559). Petitioner withdrew cash in the sum of $988.00 on January 24, 1964, from the Bank of America (R.T. 486).

Petitioner's salary was in excess of $12,000.00 during the year of 1964 and Sheila Coats had a basic salary of approximately $400.00 per month (R.T. 641).

Sheila stated that she and petitioner cashed their pay checks and received small bills (R.T. 642) because petitioner was going through a divorce and he was afraid of cashing any large bills because there was an investigator following him (R.T. 643). She testified that she was saving $1.00 Federal Reserve Silver Certificates. She had 250 or 255 of these bills accumulated (R.T. 643).

(See Appendix "C" attached hereto, a United Press International release, dateline New York, Tuesday, December 26, 1967, appearing in the San Francisco Examiner, an article entitled "Big Money in Silver Notes". Saving silver certificates has been a common hobby.)

Sheila Coats maintained a checking account during the year of 1964. She testified that the excess of the salaries of her and petitioner were kept by them in a steel box. In early 1964, they opened up a safe deposit box to keep it safe (R.T. 646), and her name was added on the box in August of 1964. The checking account was maintained for payment of the rent and payments to petitioner's former wife (R.T. 60), the first payment to petitioner's wife having been in the amount of $75.00 on July 31, 1964 (R.T. 66-67). Sheila and petitioner had been planning to take a week-end trip to Los Angeles on July 31, 1964, but it was called off at the last minute because petitioner was assigned on July 31st to work August 1, 1964 at the Hibernia Bank (R.T.675).

Ken Coppock, an accountant, testified that on March 15, 1964, petitioner bought an automobile from him with a trade-in and $1,543.68 in cash (R.T. 718).

During the Government's case there had been testimony concerning two hammers which the Government attempted to tie into the burglary without avail. At the end of the prosecution's case, motions were made to strike all the testimony concerning the two hammers in question. The motions were denied (R.T. 526) and the hammers went into the Jury Room during deliberation.

We shall hereinafter set forth certain portions of the opening statement and arguments of the Attorney for the United States Government in considering questions which the petitioner raises in this case.

REASONS COMPELLING THE ALLOWANCE OF THE WRIT

1. PROOF OF THE UNEXPLAINED POSSESSION OF UNUSUAL AMOUNTS OF MONEY AFTER A THEFT, STANDING ALONE, IS NOT COMPETENT EVIDENCE TO CONNECT THE POSSESSION WITH THE THEFT AND SUCH PROOF IS INADMISSIBLE IN A FEDERAL CRIMINAL PROSECUTION.

1. Proof of the unexplained possession of unused amounts of money after a theft, standing alone, is not competent evidence to connect the possession with the theft, and such proof is inadmissible in a federal criminal prosecution.

The trial court erred in allowing Sterling Blair to testify after proper objections had been raised.

In its opinion below, the Court of Appeals for the Ninth Circuit also rejected the long established legal proposition

> " * * *that proof of unexplained possession of unusual amounts of money after a robbery (sic), 'standing alone', is not *competent* evidence to connect the possession with the robbery (sic) absent a showing of prior poverty, * * * " (Emphasis added.) Opinion, page i (Appendix "A").

Such a rejection is singular and contrary to decisions of the *United States Supreme Court (Williams vs. United States,* 168 U.S. 382, 396, 397 18 S. Ct 92); the *Second Circuit (United States vs. Jackson,* 102 F.2d 683); the *Third Circuit (United States vs. Howell,* 240 F.2d 149, 158); the *Fifth Circuit (Gill vs. United States,* 285 F.2d 711, 713; *Self vs. United States,* 249 F.2d 32, 35); and the *Eighth Circuit (Hansbrough vs. United States,* 156 F.2d 327, 329; *Neal vs. United States,* 102 F.2d 643, 648; *Haas vs. United States,* 344 F.2d 56, 63).

The objection to the testimony of Sterling Blair is that such testimony is *incompetent* unless the government proves a proper foundation. The foundation is set forth in the cited authorities. The United States Supreme Court and other Circuits do not refer to *relevancy* as the objection to admissibility. Assuming the *relevancy* of such testimony, it does not pass the *competency* test. The Court of Appeals for the Ninth Circuit bases the admissibility of such testimony solely upon *relevance.*

Following the above-quoted passage of the opinion below, it is stated therein:

> "However, the *relevance* of Blair's testimony did not depend upon the large amount involved but rather upon other unusual circumstances which the jury could regard as incriminating. * * * " (Emphasis added.) Opinion, page i (Appendix "A")

The requsite foundation for *competency* (and, in turn, *admissibility)* is as follows:

(1) The impecuniosity of the defendant just before the theft, *and*

(2) his sudden acquisition of wealth, *and*

(3) such being contemporaneous with the theft, *and*

(4) some necessary or rational connection between the sums in defendant's possession and those he is charged with taking.

All of the cases cited heretofore set forth these requisites.

All of the elements are in the conjunctive. The government offered proof only as to the fourth point. No foundation has been established for the admissibility of Blair's testimony.

Not since this Court's ruling in *Williams vs. United States,* supra, in 1897, has any other Circuit Court varied from this Court's mandate. *Williams,* supra, was reversed on this point. The erroneous admission of Blair's testimony resulted in a trial without due process of law.

Prior to the opening statement of the prosecutor in the trial herein, petitioner objected to any reference to Blair's testimony and filed his First Trial Memorandum to support his position in this regard.

Not only did the prosecutor refer to the subject in his opening statement, but also he offered Blair's testimony in the trial of the cause over petitioner's vehement objections and dwelt upon it in his final argument.

In any event, this Court should grant certiorari herein in order that the rulings in the various circuits are uniform in the application of this very important substantive rule of evidence which strikes at the heart of due process.

By the witnesses who testified at trial, it was clearly demonstrated that the petitioner in this case was in no financial straits what ever. His earnings plus the earnings of Shiela Coats, later married to the petitioner, were such that it would completely wipe out any theory that petitioner was in bad financial straits. The attorney for the United States Government, realizing that he had utterly failed to prove the very things that he claimed in his opening statement, later attempted to justify the admission of the Blair testimony. He abandoned the theory on which the evidence was admitted. When a motion was made to strike the testimony of Blair from the record the prosecutor stated for the first time that he had not offered it for the originally claimed purpose which the law permits but for the purpose of proving the petitioner had lied to Blair and so he argued to the jury. This testimony had no

probative value. It was of the utmost danger to the petitioner in this case. The objections to it should hve been sustained and the motions to strike and for mistrial should have been granted.

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2. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BASED ITS OPINION, IN PART, ON STATEMENTS BY THE PROSECUTOR OR SET FORTH IN THE GOVERNMENT'S BRIEF WHICH ARE CONTRARY TO THE EVIDENCE ADDUCED AT THE TRIAL.(1)

Assuming only for the sake of argument that the *Ninth Circuit* is correct in its holding as immediately referred to heretofore; and, further assuming that the *United States Supreme Court* and all circuits other than the Ninth deciding the issue are in error, can an affirmation of conviction stand when *on its face* it is based upon circumstances which are substantiated only by the erroneous statements in the government's brief and have no substantiation in the record?

The *Ninth Circuit* stated *in its opinion* below part of which was cited heretofore:

> " * * * However, the *relevance* of Blair's testimony did not depend upon the large amount involved but rather upon other unusual circumstances which the jury could regard as incriminating — particularly that petitioner produced *the sum ($3,000.00)* from a brown paper shopping bag; *that it consisted entirely of bills under twenty dollars in denomination* and included two large bundles of five dollar bills and two hundred one dollar bills; *that appellant told the witness Blair a false story as to the source of the bills, and that the alternate*

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(1) Petitioner raised this issue in his Petition for Rehearing below. (Petitioner's Petition for Rehearing, pages 3-5.)

explanation offered at trial (that appellant kept his funds in unbanked cash to conceal them from a private investigator hired by his former wife) seemed at least questionable." Opinion, pages i, ii (Appendix "A").

The italicized words in the opinion cited above are not based upon the evidence adduced at the trial herein. Rather, they are based upon incorrect statements set forth by Government counsel in his brief or in statements made in his Opening Statement or Argument to the Jury which were not supported by any evidence whatever.

In displaying the error of the Ninth Circuit and the flaunting disregard of a defendant's rights at bar by Government counsel, an examination of the "unusual circumstances which the jury could regard as incriminating" as set forth in the italicized portion of the Opinion set forth above is in order.(2)

Circumstnce: The $3,000 received by Sterling Blair from appellant consisted entirely of bills under twenty dollars in demoniation.

Source: Government Brief, page 17.

"With Miss Coats standing in the room of the Blair home, he paid for the car in currency in denominations *under* $20."

Fact: R.T. 325.

Mr. Blair testified that the denomination of the bills was $20 or less and that there were *four* denominations altogether.

Circumstance: Appellant told the witness Blair a false story as to the source of the bills.

Source: (a) Government Brief, pages 17-18.

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(2) We shall indicate the *circumstance* from the opinion, the *source* of the circumstance and the fact as adduced before the court in the trial reporter's transcript.

Citing Blair's testimony, " * * * [petitioner said] he had found it necessary to go to his company' office and get the cash * * * " (R.T. 337, 338)

"Mr. Scott, Thompson's employer, testified Thompson never obtained any money from him or the company other than his paycheck."

(b) Final argument of Government Counsel:

"Do you buy automobiles with false statements to the seller about where your cash is coming from?" (R.T. 745)

"So there is one liar. Then Mr. Thompson. We heard his lie repeated from Sterling Blair. He went and bought an automobile for $3,000 cash. He paid for it with 200 one dollar bills. He said to Mr. Blair in front of Mrs. Thompson — in front of Mrs. Blair, 'I got the money from my employer's safe at the office.'(3)

"Now, ladies and gentlemen, if he got it from his employer's safe, you can be sure Mr. Scott — who sits here — would say so. If he didn't, Mr. Scott would also say so. Mr. Scott is a businessman. He has no reason to prevaricate about anything in this case, and he said, 'No sir, not out of my safe, not out of my office.' " (R.T. 752)

Fact:

Blair testified Thompson told him "he [Thompson] had found it necessary to go to his company office and get the cash * * * " (R.T. 337, 338)

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(3) It is still difficult to understand the basis for the admissibility of what petitioner *said* to Blair and what petitioner *said* or did with his employer unless the testimony of each were offered to impeach the other. In this regard, it should be noted that Blair and Scott were both Government witnesses and timely objections to their testimony were made.

> Mr. Scott, petitioner's employer, testified that *he,* Scott, had never loaned petitioner money; that the company never loaned petitioner money; *but,* that *he did not know* whether any officers or agents under his control loaned petitioner sums of money. (R.T. 50, 51.)

Circumstance:. The alternate explanation offered at trial (that appellant kept his funds in unbanked cash to conceal them from a private investigator hired by his former wife) seems at least questionable.

Source:

> This conclusion that such is an *alternate* explanation can only be made if it is concluded that petitioner lied to Blair. Such is contrary to the proof. *(supra).*

Fact:

> This circumstance was testified to by Sheila Thompson, petitioner's wife. Her testimony, which was lengthy, stands unimpeached — except for the collateral impeachment that she stated she was married to petitioner at the time he was arrested.

Thus, the Opinion below is not based upon the trial record and a reversal is in order.

It is submitted that Government Counsel deliberately misled the appelate court in the same manner as he deliberately misled the trial court and jury.

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3. THE DELIBERATE MISREPRESENTATIONS AND GROSS MISCONDUCT BY GOVERNMENT COUNSEL THROUGHOUT THE TRIAL DEPRIVED PETITIONER OF A FAIR AND IMPARTIAL TRIAL.

At the outset, it should be noted that the Opinion below dis-

missed this contention with the following terse comment:

> "We find no prejudicial misconduct on the part of government counsel * * * " Opinion, page iii (Appendix "A").

If the decision is allowed to stand in this regard, there is a new low standard for the conduct of Government counsel in prosecuting a federal criminal case. (4)

Specifically set out are the various incidents which clearly establish the prejudicial misconduct of the attorney for the United States Government.

The pattern of the manner in which the Government attorney conducted the Government's case begins with the opening statement on page 17, lines 18-24, of the Reporter's Transcript. The statement was made to try to establish that petitioner was in financial straits at the time of the burglary and had a sudden acquisition of wealth immediately thereafter.

The prosecutor stated that he would prove the following: That petitioner was being divorced; that he had financial burdens connected with the divorce action; that he was maintaining three residences, one a home in Pacifica, one an apartment in San Francisco, with Sheila Coats and another apartment in San Francisco with Mary Alomar; that, shortly after the commission of the burglary he had exhibited a large amount of cash to Mary Alomar; and, that he bought expensive electronics and sport cars.

There was not one word of testimony ever offered as to any one of those statements, nor was there any evidence to the effect that the petitioner ever knew such a person as Mary Alomar. This was the only mention of "Mary Alomar." The name never arose in

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(4) It should be noted that Government counsel is not a novice or overzealous inexperienced prosecutor. Trial Counsel for the Government and Appellate Counsel in the Ninth Circuit was Jerrold M. Ladar, Assistant United States Attorney, a thoroughly seasoned, experienced and successful prosecutor.

the first trial. There was no further mention of it in the second trial.(5)

While it might appear to be insignificant, this statement was of the utmost damage to the petitioner. He was already under the handicap that he was living with Sheila Coats without benefit of clergy and to put him in the position where he was in effect supporting another woman and showing her large sums of money could not help but put petitioner in a very unfavorable light before the jury.

In the opening statement the jury was told of the hearsay statements of both the witnesses Robeson and the witness Heim (R.T. 15). The conversations as to what these men told the Federal Bureau of Investigation were outside the presence of petitioner and constituted the rankest kind of hearsay.

The jury was told that the petitioner had purchased an automobile for $3,000.00 in cash without being informed that this was some several weeks after the alleged burglary and that at that time the Government attorney well knew that the finances to purchase that automobile came from money legitimately in the hands of petitioner.(6)

In the opening argument the prejudicial misconduct of the Government attorney was completely demonstrated. He recreated an imaginary conversation as though it was an actual conversation between Heim and agents of the Federal Bureau of Investigation (R.T. 737). He included the alleged thoughts of Heim and stated that Heim had told the Federal Bureau of Investigation that he

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(5) The court may take judicial notice of the records of the first trial in *United States vs. Robeson and Thompson,* Criminal No. 40105 in United States District Court for the Northern District of California. *Chandler vs. United States,* 378 F.2d 906, 909-910 (1967).

(6) The attorney for petitioner had furnished the Court and the Government attorney with "Defendant's First Trial Memorandum" prior to the trial charging the admissibility of the testimony of the Government's witness Blair. Yet in the opening statement the jury was told without reservation concerning the purchase from *Blair* of the automobile by petitioner.

knew that petitioner was one of the persons who had committed the burglary in question.

In his First Trial Memorandum, the attorney for petitioner had notified both the Court and the Government attorney in advance that the petitioner would not take the witness stand in his own behalf. Yet in discussing the testimony in this case, without any support in the evidence at all, he stated that this was a professional job (R.T. 740). He had already referred to the burglary as an "inside professional job." Again he stated that the Federal Bureau of Investigation evaluated *two professional names* and picked the professional who was less likely to avoid questioning, referring to the witness Robeson. This was a plain attempt to get before the jury the fact that the petitioner had a criminal record. This would completely destroy the petitioner's constitutional right to remain off the witness stand. Could anybody doubt that in the minds of the jury the word "professional" could only mean "professional law-breaker"?

He accused the defense of having picked the witnesses (R.T. 742, 15-24) He further stated that the wife of the petitioner, formerly Sheila Coats, would never talk to the Government until she came to trial. At no time was Sheila Coats ever on trial. This was a plain attempt to mislead the jury and was never a correct statement of the evidence because Mrs. Thompson had talked to agents of the Federal Bureau of Investigation and was thoroughly cross-examined by the Government attorney himself.

He stated that Robeson had testified that Thompson put an "x" on the wall so that Robeson would know where to make the hole to get into the safe (R.T. 746). This is a complete misstatement of the evidence. Robeson had never given any such testimony.

He deliberately misstated the testimony of the witnesses for petitioner (R.T. 748). All of these witnesses were disinterested persons who were not impeached in any manner at all. Yet he sought to mislead the jury by claiming that their statements were inconsistent as to the time that they saw Mr. Thompson on the

morning of August 1, 1964.

He accused the witness Calhoun of testifying falsely in the first trial of this cause without any legal impeachment whatever of the witness (R.T. 749)

On page 750 of the Reporter's Transcript, he reviews part of the testimony, mostly concerning the time element. He then made this comment, "But isn't it strange that the only period of time that *Mr. Thompson* can't adequately explain what he was doing is that crucial moment between 7:00 and 8:00 in the morning?" (R.T. 750, 17-20). This was a crude effort to get around the rulings in *Wilson vs. United States,* 149 U.S. 60, 13 S.Ct. 765 and *Bruno vs. United States,* 308 U.S. 297, 60 S.Ct. 198. The rulings were recently re-enunciated in *Griffin vs. State of California,* 380 U.S. 609, 85 S.Ct. 1229.

In this regard, in his Opening argument, he stated:

> "So there is one liar. Then Mr. Thompson. We heard his lie repeated from Sterling Blair. He went and bought an automobile for $3,000 cash. He paid for it with two hundred one-dollar bills, plus a lot of small bills. He said to Mr. Blair in front of Mrs. Thompson—in front of Mrs. Blair, 'I got the money from my employer's safe at the office' " (R.T. 752, 10-16).(7)

Thus, in addition to his comment on petitioner's failure to testify, he seriously misquoted the evidence and repeatedly called petitioner and his witnesses "liars" based upon his distortion of the testimony.

He referred to the petitioner's wife as a liar by reason of the fact that when she first talked to the agents of the Federal Bureau

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(7) As stated heretofore, Blair did not so testify. Blair testified "he [Thompson] had found it necessary to go to his company's office and get the cash necessary to do this, because he had not been able to get to his bank that day" (R.T. 337-8). Scott, appellant's employer, merely testified, over objection, that he never loaned appellant any money (R.T. 50).

of Investigation, she said that she and Thompson were married. This was absolutely immaterial to the guilt or innocence of the accused. Yet he stated this to destroy this highly important witness. He harped on the statement that she was not actually married (R.T. 752).

In his argument, for the first time, he permitted himself to explain the subterfuge that he had used in getting the Blair testimony admitted. He argued that Blair's testimony proved the accused had lied to Blair and was therefore a liar.

He ridiculed the testimony of the witness Calhoun. Without any support from a legal standpoint, he used the weight of his office to mislead the jury as to this witness. In discussing the testimony of his own two star witnesses, Robeson and Heim, he said that the petitioner "picked" his people completely ignoring the fact that Robeson and Heim had worked together on a job and were actually living together.

In his closing argument, the Government attorney discussed the testimony concerning a mug-shot shown to Robeson. In the first trial, Robeson had identified a mug-shot of the accused as being shown to him on December 11, 1964, the day of his arrest. The mug-shot referred to showed on its face it was taken the following day, December 12, 1964. In that trial the prosecutor did not see the inherent impossibility of this testimony until it was disclosed in the final argument.

In an apparent attempt to minimize the effect of this perjury on behalf of the principal Government witness, he argued that Robeson was shown another police photograph "obviously earlier" (R.T. 765, line 3). There can be only one reason for that statement, to once more get before the jury the fact that petitioner had previously been in trouble.

During the trial of the case, the prosecutor elicited testimony from the convicts Heim and Robeson regarding an independent crime, that of receiving stolen property on behalf of petitioner. They had testified that Earl Leighty, who was known as "Big

Earl", a foreman on the job where they all worked, was present when Robeson had sold stolen property to the petitioner. If that testimony, which should never have been admitted in the first place, was proved to be untrue then the jury could see through these two perjurers in this trial. Leighty was called by petitioner and took the stand with no motive to lie. He absolutely and unequivocally told the jury that never in his presence had Thompson purchased anything, stolen or otherwise, from Robeson. Contrast what Leighty represented as against what Robeson and Heim represented. Heim had taken the stand and blithely admitted, without as much as a sigh or regret, that hewas then on probation for the crime of pandering from the State of Nevada. He had placed his own wife in a house of prostitution and made her a common harlot. What category of crime could any person commit that would be of a lower quality that that of a man who would do such a thing? Robeson, according to Heim, had committed numerous burglaries and he, Heim, had hauled some of the stolen material around. Both of these individuals, while working on the development job, had gone out and bought cheap sweaters for $4.00 apiece and then represented them to their fellow workers, seeking to corrupt them, that they were stolen property and then sold them for three or four times their value. Robeson, although the person who actually admitted the physical act of committing the crime, had received a sentence of 18 months as a burglar. So, when Leighty took the stand and conclusively established that two perjurers had lied to the jury, the petitioner was entitled to have Leighty's testimony go before that jury untainted in any manner. At that time one of the first questions asked of Leighty by the prosecutor on cross-examination was whether he had ever been convicted of a felony. How many laymen know the difference between a felony and a misdemeanor? The question answers itself. Because he was an honest man, Leighty said he had been "picked up for a 502" and apparently from what happened (as shown by the record) neither the judge nor the prosecuting attorney knew that a 502 was a misdemeanor and in no way involves moral turpitude. (i.e. Former California Vehicle Code Section 502)

The following reflects the questions that were asked in that regard:

> "Q. Mr. Leighty, you said that you never observed Mr. Robeson or Mr. Heim sell anything to anybody during your time of tenure on Red Rock Hill, is that right?
>
> A. That is right.
>
> Q. And you, I take it, have never been convicted of any felony, have you?
>
> Q. Have you ever been convicted of any felony?
>
> A. I have been picked up on a 502, yes, down in Sacramento.
>
> MR. CRAGEN: May that go out, Your Honor? A 502 is certainly not a felony. That is a driving violation.
>
> MR. LADAR: I don't know whether it can or can't be, Your Honor.
>
> THE COURT: I don't know either. We can tell the jury when I look it up. I don't know the answer either offhand.
>
> MR. CRAGEN: 502 is no longer in existence. It is now 23102. (California Vehicle Code Section 23102)
>
> THE COURT: I know, but at the time this gentleman states he was convicted, it may have been a 502 at that time. It could either be under that section or it may not be" (R.T. 560, 21-25; R.T. 570, 1-14)

In *United States vs. Bell*, 351 F.2d 868, the Court held that in seeking to impeach a witness for conviction of a crime such examination must be limited to conviction for felonies or of crimes involving moral turpitude. There could never be any contention that an arrest for violation of former California Vehicle Code Section 502, driving while under the influence of alcohol, would be a crime involving moral turpitude.

Impeachment by prior conviction of a felony must be conducted in good faith. Such was not done herein.

The prosecutor, in asking a defense witness if he has ever been convicted of a felony, must be prepared to show by documentary evidence that the witness has suffered a prior conviction in the event that he denies a prior conviction. If he is not so prepared, good faith is lacking and the error committed is reversible.

See *People vs. Perez,* 58 Cal.2d 229, 23 Cal.Rptr. 569, at page 574, where the California Supreme Court discusses the point thoroughly:

> "As stated in *People vs. Craig,* 196 Cal. 19, 28, 235 P. 721, 724 'The usual manner of making proof of a prior (felony) conviction is to ask the witness *who has suffered such a conviction* if he had been theretofore convicted of a felony, and, *if he denies that he has been so convicted, to produce a copy of the judgment of conviction.*" (Court's Emphasis.) The clear implication of the latter statement in *Craig* is that the questioner should be prepared to show by documentary evidence that the witness has suffered a prior conviction, in the event of a denial thereof. (Citations) * * * "
>
> " * * * It has also been announced in other jurisdictions that an interrogator, in order to avoid a charge of misconduct must be prepared to follow up with proof questions of a witness concerning prior felony convictions. (Citations from Utah, Arizona, Texas, Montana and Illinois cases) * * * "

During the trial, the United States Attorney cross-examined Sheila Coats concerning her refusal to testify before the grand jury.

We submit that it was error for the prosecuting attorney to examine and to be permitted to so examine Mrs. Thompson. Mrs. Thompson as a witness, was in the exact position, under the circumstances, as a co-defendent. It should be noted that the attorney for the United States said that she would not talk until

she came to trial. She was not on trial at any time and we think that the language to be found in *Fagundes vs. United States*, 340 F.2d 673, at page 677, is significent:

> "When one takes the stand in his own defense he, of course, puts his credibility as a witness in issue. Never theless, we think it reversible error to permit evidence of refusal to talk and of request for counsel on arrest to be used for the purpose of impeachment."

In addition to that examination, Mrs. Thompson was examined as to an alleged conversation she had with the prosecuting attorney. When she denied such conversation took place, no effort was made to prove that it did take place.

These are but several of the many glaring efforts of the Government attorney to prevent Thompson from receiving a trial as guaranteed all citizens of the United States under our constitution. The gross misconduct of the attorney for the United States began with the opening statement and continued through the final argument.

This court condemned identical misconduct in *Berger vs. United States*, 295 U.S. 78, 55 S.ct 629, at page 633.

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul one. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as

it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should be properly carry none. The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only th conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak — depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record" [*Berger vs. United States,* 295 U.S. 78, 55 S.Ct. 629, at 633].

Stewart vs. United States, 247 F.2d 42, was reversed on far less misconduct than the present case. The type of appeal to the jury used by the Government attorney in the present case was condemned in *Viereck vs. United States,* 318 U.S. 236 63 S. Ct. 56 and in *Hanford vs. United States,* 249 F.2d 295

This prosecutor should not be allowed to hang the scalp of this petitioner in his trophy room. Since this court has recently condemned improper police procedures, perhaps a review of improper prosecution proceedures is in order.

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4. THE TRIAL COURT PREJUDICIALLY ERRED IN REFUSING TO GIVE THE DEFENSE-OFFERED INSTRUCTIONS ON IMPEACHMENT OF WITNESSES BY PRIOR INCONSISTENT STATEMENTS AND BY ADMITTED PERJURY.

The petitioner offered as proposed instructions the standard

instruction on the impeachment of witnesses by proving that at other times and places he had made statements inconsistent with his present testimony and that the government witnesses were impeached by admissions of perjury in the first trial. The Court rejected the said instructions and refused to give any instruction on these types of impeachment. After the jury had retired the petitioner again called the Court's attention to its failure to give the instructions and the Court denied the appellant's motion to have the instructions given to the jury. These instructions were submitted to the Court by the petitioner's attorney at which time he called the Court's attention to the fact that a Federal court must charge the jury on the broad fundamental rules of law applicable to the principal issues of fact in the case.

In *Turner Construction Co. vs. Houlihan,* 240 F.2d 435 (1st Cir. 1957) it ws stated:

> "In criminal cases the court must instruct on all essential questions of law whether required or not."

Smith vs. United States, 230 F.2d 935 (6th Cir. 1956); *Todorow vs. United States,* 173 F.2d 439 (9th Cir. 1949), cert. denied 337 U.S. 925, 69 S.Ct. 1169, 93 L.Ed. 1733 (1949); *Morris vs. United States,* 156 F.2d 525, 169 A.L.R. 305 (9th Cir. 1946); *United States vs. Persico,* 349 F.2d 6 (1965); *United States vs. Barnes,* 319 F.2d 291 (1963) and *United States vs. Borelli,* 336 F.2d 376 (1964).

It was of the utmost importance to the petitioner that this principle of law be explained to the jury by the Court. The record shows that the witness Robeson, the man whose testimony was relied on by the Government to convict this petitioner, was impeached by showing either his testimony in the previous trial or by statements made to other persons inconsistent with his testimony in his trial. He was impeached on page 291 of the Reporter's Transcript, and also on pages 293, 294, 296, 301, 304 to 308, and further on page 310; again he was impeached on pages 438, 441 to 445, 447 to 451, 453, 455, and 456 of the Reporter's

Transcript. We have not again set out verbatim these various impeachments but the Court permitted both the foundation for impeachment and the subsequent showing of the inconsistent statements. The jury must have been utterly confused by hearing the testimony of the witness Robeson and not being given any legal principle to apply to the impeaching testimony. The witness Heim was likewise impeached. He was the other star of the Government's case. Yet the jury was left to determine for themselves how they were to apply this evidence with the law of impeachment. As the Court said in *Morris vs. United States,* supra, at page 526:

> "The charge to jury should not leave jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged."

Again from *Morris vs. United States,* supra, at page 526:

> "In criminal prosecution, the court should instruct that the court gives the law to the jury and the jury applies it to the facts."
>
> " 'Instructions upon the law' are statements or announcements of the rules of law to be applied by a jury to facts found by them" *(Morris vs. United States,* 156 F.2d 525, at page 526, 169 A.L.R. 305).

It requires no great legal skill to see the terrible position this petitioner was left in by the Court's failure to instruct on this very vital issue. For 250 years the Commonwealth of England has permitted no citizen of that realm to be convicted of a crime upon the testimony of one who admits that he was a participant in the crime. Federal rules do not permit the conviction of a defendant upon the testimony of an accomplice but seeks to safeguard the rights of the accused by surrounding the testimony of that type of witness with many restrictions and one of the most effective weapons placed in the hands of the defense is proof that the witness is unworthy of belief by the untruths he admits.

5. IT WAS REVERSIBLE ERROR ON THE PART OF THE JUDGE IN REFUSING THE DEFENSE MOTIONS FOR ACQUITTAL OR MISTRIAL.

The petitioner was entitled to have his motion for acquittal granted or, in lieu thereof, a mistrial granted.

The attorney for the Government utterly failed to establish, even by a scintilla of evidence, the statements that he had made in his opening statement concerning the impoverished condition of the petitioner and his sudden acquisition of wealth as justifying the testimony of witness Blair.

In his opening statement the attorney for the Government stated he would prove that the petitioner had maintained three separate living establishments: one with his former wife and two with different women — Sheila Coats and Mary Alomar. Further, he stated he would prove he had shown Mary Alomar a large sum of money. Mary Alomar's name appears no place in the record of both trials except in the opening statement in this trial.

It has been held repeatedly that it is reversible error not to prove statements of this nature when made by the Government in its opening statement. This type of conduct on the part of the Government attorney is strongly condemned in *Allen vs. United States*, 223 F.2d 85, 87.

CONCLUSION

For the reasons stated above, we respectfully submit that certiorari should issue to review the decision of the Court below.

Dated, San Francisco, California,
March 7, 1968.

William Klein,
Attorney for Petitioner

Edward L. Cragen
Of Counsel

(Appendices "A" "B" and "C" Follow)

Appendices "A" "B" and "C"